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Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 36.

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE,

PETITIONER.

v.

MARY ADELAIDE POOR et al, SURVIVING EXECUTORS,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR MARY ADELAIDE POOR, ET AL., EXECUTORS.

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OPINIONS BELOW

The opinion of the District Court (R. 43–49) is reported in 8 F. Supp. 995. The opinion of the Circuit Court of Appeals for the First Circuit (R. 53–57) is reported in 75 F. (2nd) 35.

QUESTIONS PRESENTED

This is an action at law against a collector of Internal Revenue brought by the executors of the will of Adelaide J. Sargent to recover an estate tax assessed under the Revenue Act of 1926. It is before this Court on a writ of certiorari

issued to review a judgment of the Circuit Court of Appeals for the First Circuit which affirmed a judgment for the plaintiffs entered in the District Court for the District of Massachusetts.

The decedent died in 1931. She had transferred certain property in 1919 to herself, her son Arthur H. Sargent, and a third person, as trustees, in trust to pay one-half of the income to the decedent during her lifetime and the other half (and, after her death, all of the income) in equal shares to her three children (including said Arthur H. Sargent) or their appointees or issue, until the death of the last survivor of her children, at which time the capital of the trust was to be divided among the appointees or issue or next of kin of her three children. The trust instrument provided that the trust might be terminated as to any or all of the property at any time by the persons who might at the time be trustees by a written declaration signed, sealed and acknowledged by them and duly recorded. The decedent ceased to be a trustee in 1920, but was appointed trustee again in 1921 and was a trustee at the date of her death.

The question presented is whether the value of the property belonging to the trust should be included in the gross estate of the decedent in computing the estate tax.

The principal subsidiary questions involved are:

1. Whether, because of the existence of a power of termination given to the trustees, the transfer was one the enjoyment of which was subject, at the date of the decedent's death, to a "change through the exercise of a power either by the decedent alone, or in connection with any person, to alter, amend or revoke" within the meaning of section 302(d) of the Revenue Act of 1926.

2. Whether the provisions of section 302(d), if applied to the transfer in this case, which was completed before the Act was passed, would violate the Fifth Amendment to the Constitution of the United States.

3. Whether, if there are valid objections against including in the gross estate the share in the trust property which belonged to Arthur H. Sargent, the shares of the other two children of the decendent may be included in the gross estate.

STATUTES INVOLVED

The statutes involved are Section 302 of the Revenue Act of 1926 and its sub-sections (d) and (h) (c. 27, 44 Stat. 9, 70, 71). The material portions read as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated —"
>
> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.
>
> . . . . . .
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The first statute which contained provisions similar to those of Section 302(d) of the Revenue Act of 1926 was Section 302(d) of the Revenue Act of 1924, c. 234, 43 Stat. 304, which reads as follows:

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power, in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;"

The Fifth Amendment to the Constitution of the United States, which is also involved, reads as follows:

"Art. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The portion of Section 302(c) of the Revenue Act of 1926 c. 27, 44 Stat. 70, which is referred to in the argument is as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth . . ."

STATEMENT OF MATERIAL FACTS

Adelaide J. Sargent died on January 22, 1931. She was a resident of Boston, Massachusetts, and a citizen of the United States. Her last will was allowed and the respondents, Mary Adelaide Poor and George Winthrop Sargent, together with Arthur H. Sargent, since deceased, were appointed executors on February 19, 1931. (R. 8–9).

The Commissioner of Internal Revenue included in the decedent's gross estate the value of the property of the trust created by her in 1919, amounting to $437,891.42 (R.10). There is no dispute as to this value. (R.33). The estate of the decedent, exclusive of this trust property was less than the allowable deductions and exemptions (R.11–12). Accordingly the validity of the entire tax depends upon whether the value of the trust property was properly included in the decedent's gross estate.

The trust referred to was created by the decedent on December 31, 1919, by a conveyance of certain property to three trustees, who were herself, Arthur H. Sargent, who was her son, and a third person not connected with the family, to be held in trust under the terms of a contemporaneous declaration of trust executed by them called "The Sargent Trust" (R. 9, 12). A copy of this declaration is annexed to the Agreed Facts marked Exhibit C (R.12–18). By its terms the trustees were to pay one-half of the net income to Adelaide J. Sargent during her lifetime and the other half of the net income, up to the time of her death, (and all of it after her death) in equal shares to such of her three children Arthur H. Sargent, George Winthrop Sargent and Mary Adelaide Poor, as should be living at the time of such payments and to the appointees of such child or children as should have died prior thereto, or in default of such appointment, to the then living issue of such deceased child or children (R.13). The trust was limited to terminate upon the death

of the last survivor of Adelaide and her three children, and on such termination the capital was to be divided in designated shares among the issue or next of kin or appointees of the three children. Each child was given a general power of appointment by will over one third of the trust property (R. 14). The decedent's three children survived her (R. 8–9).

In the Declaration of Trust the trustees were given the following power to terminate the trust:

> "EIGHTH. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, and a like share shall be paid over and conveyed to the appointees by will of each of her children who shall then have died making such appointment, or failing such appointment, to the issue of such deceased child then living, such issue taking by right of representation." (R. 18).

This power has never been exercised and the trust has never been terminated either in whole or in part. (R. 33).

No power was reserved by the grantor to modify the terms of the trust and the only power of termination was the one given to the trustees by Article Eighth.

Article seventh of the declaration provided that in case of the death, resignation or inability to act of any of the trustees, a successor should be appointed by the surviving trustees by a written instrument signed, sealed and acknowl-

edged by them and approved by the then living children of Mrs. Sargent (R. 17–18).

The following changes in the personnel of the trustees were made prior to Mrs. Sargent's death in the manner provided for in Article Seventh. On November 9, 1920, the decedent resigned as trustee and her daughter, Mary Adelaide Poor, was appointed to fill the vacancy. After serving as trustee for one year, Mrs. Poor resigned on November 9, 1921, and the decedent was appointed to fill the vacancy and thereafter continued as one of the three trustees until her death (R. 33). The decedent's son, Arthur H. Sargent, was one of the trustees from the beginning of the trust until after the death of the decedent and was also a beneficiary under the trust, having a vested interest in an undivided share of the income and a power to appoint by his will his share of the income and one-third of the capital of the trust (R. 32–33, 12–14).

Most of the property included in the conveyance in trust came to Mrs. Sargent either directly from her husband who died long prior to the creation of the trust or from reinvestment of the proceeds of sales of property received from him (R. 9–10). The trust superseded two earlier trusts of substantially the same property made by the decedent in 1907 and in 1911 for the benefit of herself and her three children. The purpose of the 1919 trust, which is the trust now involved, was to fix more definitely the shares of the beneficiaries, to join as trustee a person of independent judgment who was not a member of the family and who was not beneficially interested in the trust, and to eliminate a power of revocation which the decedent had under the former trusts (R. 39, 43).

The executors objected to the determination of the Commissioner that the value of the trust property should be included in the decedent's gross estate and paid the tax under protest. Thereafter claim for refund was duly filed, the Commissioner rejected the claim and all formalities re-

quired in order to maintain suit for recovery of the tax were complied with (R. 9–11, 21–32).

DECISIONS BELOW

In the District Court trial by jury was waived (R. 8) and the case was heard by Brewster, J. on agreed facts (printed at pages 8–33 of the Record) and on oral testimony which was not reported, bearing chiefly on whether the transfer in trust was made in contemplation of death (R. 39). The Judge of the District Court found and ruled that the transfer was not made in contemplation of death (R. 43, 46), and that it was not intended to take effect in possession or enjoyment at or after the decedent's death and was not within the scope of Section 302 (c) or Section 302 (d) of the Revenue Act of 1926 (R. 46).

He also ruled that the effect of including the value of the trust property in the gross estate and assessing an estate tax on the resulting net estate would be to impose an excise tax on the transfer by a statute enacted after the transfer was completed and that this would constitute a taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States (R. 41–42). He ruled that the executors were entitled to recover the entire tax, amounting to $2533.46, with interest from the date of payment (R. 49). Judgment for the plaintiffs for this amount with interest and costs was entered in the District Court on October 25, 1934 (R. 37–38).

The defendant appealed to the Circuit Court of Appeals for the First Circuit. On this appeal the appellant raised no question as to the finding and ruling of the District Court that the transfer was not intended to take effect in possession or enjoyment at or after the decedent's death and was not within the scope of section 302 (c), but relied on the power of termination contained in the trust instrument as bringing

the transfer within the provisions of sections 302 (d). The Circuit Court of Appeals affirmed the judgment of the District Court, expressing the view that the power in question was not a power to alter, amend, or revoke, within the meaning of section 302 (d), and expressing no opinion as to whether the provisions of this section, if construed as applying in the case at bar, would violate the Constitution of the United States.

SUMMARY OF ARGUMENT

I. The transfer made by the decedent was complete before the enactment of Section 302 (d) or the corresponding provisions of the first statute on the subject, (Section 302 (d) of the Revenue Act of 1924).

The only claim made to the contrary is based on the power of termination given to the trustees and on the fact that the decedent was one of the three trustees. The decedent, however, had no control over the exercise of this power. It could be exercised only by the joint action of all three of the trustees, including the decedent and Arthur H. Sargent (who was a beneficiary of the trust) and the disinterested trustee. As Arthur H. Sargent had a substantial interest which was adverse to the exercise of the power, the transfer was as complete when it was made as if it had been absolute. If this were not so, the transfer would have become complete in November 1920, when the decedent resigned as trustee and thereby lost any right to share in the power. After she was reappointed in 1921 the right which she then had was derived, not from the original transfer, but from the reappointment made by the other trustees with the written assent of all the other beneficiaries.

II. Section 302 (d) should not be construed as applying to the power in question.

This section is a part of an estate tax law which is intended to impose taxes on transmission of property on death and on substitutes for testamentary disposition. The transfer in question was neither. The section should be construed so as to avoid the constitutional objections to its validity which would result if the section were applied to such a completed transfer. It is reasonably possible to construe it as not applying to the power in the case at bar, whether it is construed in the light of its evident purpose or literally. If it is construed in the light of its purpose, it has no application; and if it is construed literally, it does not apply because the power to "terminate" was not, on a literal construction, a power to "alter, amend or revoke."

III. The imposition of an estate tax measured in any degree by including the property of the Sargent Trust, if seemingly warranted by Section 302 (d), would be a taking of property without due process of law in violation of the Fifth Amendment to the Constitution. There are two constitutional objections to the application of the section to this trust. As the decedent had no interest in the trust property which passed to others at her death and the transfer was not made in anticipation of death or as a substitute for a testamentary disposition, the imposition of a tax on her estate measured by including in the estate the value of this completed transfer would be so arbitrary and unreasonable that it would not be due process of law. Furthermore, as the estate tax is an excise tax, Congress had no power to levy the tax on a transfer which was completed before the enactment of the statute providing for such tax.

IV. There is no basis for a claim that a part of the trust property should be included in the gross estate.

Arthur H. Sargent, one of the trustees whose consent was necessary to any termination, had an undivided

interest in all the property of the trust and consequently his rights would have been adversely affected by the termination of the trust with respect to any portion of the property.

ARGUMENT

I. The transfer made by the decedent was complete before the enactment of section 302 (d) of the Revenue Act of 1926 or corresponding provisions of any earlier statute.

The provisions now found in section 302 (d) of the Revenue Act of 1926 appear in the estate tax law for the first time in substantially the same form in section 302 (d) of the Revenue Act of 1924 (c. 234, 43 Stat. 304). The transfer in question was complete when the Sargent Trust was created in 1919. From the beginning of the trust the settlor had no control over the trust property which enabled her to shift the economic interests in the trust. The only beneficial interest left in her, after this transfer, was a right to one-half of the income during her lifetime. It is settled that the reservation of such an interest does not make a transfer incomplete.

May v. *Heiner*, 281 U. S. 238.
Morsman v. *Burnet*, 283 U. S. 783.

The Sargent Trust gave no power to anyone to alter its terms. No power of appointment was reserved under it to the settlor. The only power which might affect the interest of the beneficiaries was the right to terminate the trust given by Article Eighth to whoever should be trustees when it was exercised. This right was a discretionary one to be exercised by the joint act of all the trustees, and the decedent could not compel the other trustees to exercise it. From the beginning of the trust

until after the death of the decedent, one of the other trustees was Arthur H. Sargent, who had a life interest in the income of one-sixth of the trust (and in one-third after the death of the settlor), the power to appoint his share of the income, and a general power of appointment by will over one-third of the principal. He had an undivided interest in every part of the trust property. Any termination of the trust with respect to any part of the property which would have revested such property in the decedent would have decreased the capital from which Arthur H. Sargent derived his income and the value of the share which he had a right to appoint. His interest was therefore adverse to the termination of the trust in whole or in part. It is clear that the existence of such a right of termination did not give to the decedent any effective control over the economic interests in the property and that the transfer was complete when it was made.

Reinecke v. *Northern Trust Co.*, 278 U. S. 339.
McCormick v. *Burnet*, 283 U. S. 784.

These cases show that where one of the beneficiaries of a trust must join in any termination or modification to make it effective, the transfer is to be treated as an absolute one from the time when it was made.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the question was whether under the provisions of Section 402 (c) of the Revenue Act of 1921, (later incorporated in Section 302 (c) of the Revenue Act of 1926), the value of the property of seven trusts established between 1902 and 1919, was properly included in the estate of a decedent who died in 1922. In two of these trusts the income was reserved to the settlor for life and after his death was to be paid to a designated person until the end of the trust and there were remainders over as to the trust corpus. In each of these two trusts a power to revoke the trust

was reserved to the settlor alone. In the five other trusts the settlor gave life estates to others, to continue until five years after his death or until the death of the respective life beneficiaries, and remainders over as to the corpus. In these five trusts the settlor reserved the power "to alter, change or modify" the trusts, *to be exercised in the case of four trusts by the settlor and the single beneficiary of each trust acting jointly, and in one trust by the settlor and a majority of the beneficiaries acting jointly.* It was held that the value of the property of the two trusts which *the settlor alone* had power to alter, change or modify should be included in the decedent's gross estate, because a transfer subject to such a power in the settlor did not become complete until the settlor's death; but that the transfer of the property included in the other five trusts was complete when the trusts were made because the power reserved to the settlor in those trusts could be exercised only with the consent of one or more of the beneficiaries, and consequently the property in these trusts could not be included in the gross estate. The language of the opinion upon this point, at page 346, is as follows:

> "If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. *Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.*" (Italics ours).

In the same case this Court said, at pages 346–347:

> "The shifting of the economic interest in the trust property which was the subject of the tax *was thus complete as soon as the trust was made.* His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, *the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax.*" (Italics ours).

This Court has treated *Reinecke* v. *Northern Trust Co.* as holding that where the exercise by the settlor of a power to alter or revoke a trust is dependent on the consent of a beneficiary whose interests would be adversely affected, the trust property has passed as completely from the control of the settlor as if the gift had been absolute. In *Porter* v. *Commissioner*, 288 U. S. 436, which dealt with the application of Section 302 (d) to a trust in which the *settlor alone* had power to change the disposition of the property, the opinion of the Court distinguished the trust under consideration from the five trusts in *Reinecke* v. *Northern Trust Co.* in which the consent of one or more beneficiaries was necessary, saying as to the latter (at page 442)

> "As title was put beyond his" (the settlor's) "control, we held these transfers not taxable."

In *Reinecke* v. *Smith*, 289 U. S. 172, this Court referred to the decision in *Reinecke* v. *Northern Trust Co*, as follows, at page 176:

> "The tax was upheld as applied to the corpus of trusts over which the grantor had sole power of revocation. It was, however, condemned as to those where revocation was dependent upon joint action of the grantor and the beneficiary, for the reason that the interest of the beneficiary was adverse and the grantor unable at will to alter or destroy the trust.

> In the latter case the transfer was said to be effective when made, not at death. As pointed out in *Burnet* v. *Guggenheim*, 288 U. S. 280, the same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income."

The fact that the case of *Reinecke* v. *Northern Trust Co.* related to a tax claimed under Section 302 (c) rather than 302 (d) does not affect the force of the decision as laying down a test of when a transfer is to be regarded as complete. The test thereby established is applicable wherever that question is at issue. The Circuit Court of Appeals in the case at bar has stated the underlying principle as follows: — "If A gives property to B, reserving to himself the right to revoke the same only upon B's consent, the transfer is complete, the reservation is nil, and whether A gets the property back or not lies wholly with B." (R. 57.)

Counsel for the petitioner argues, however, that in the case at bar the control of the power which was placed in Arthur H. Sargent amounted to very little as he was in France a greater portion of the time; that under Article Second of the trust agreement the other trustees could exercise all the powers during his absence from the United States; and therefore that the decedent retained control over the trust property in conjunction with the disinterested trustee. There are two answers to this contention. The first is that the provision in Article Second that in case of the absence of any trustee from the United States, the other trustees might exercise all the powers "herein given to the trustees and perform all their duties, and the trustee so absent shall not be liable for the acts or omissions of his co-trustees during the period of such absence . . ." (R. 15–16.) refers to the powers of management contained in Article Second, and does not refer to

the right to terminate, which is given to "the person or persons who shall then be trustees thereunder" in Article Eighth. The second answer is that at the time of the death of the decedent and for several months before, Arthur H. Sargent was continuously in the United States and consequently, on any construction of the provisions relating to the absence of a trustee, the decedent did not have power at the time of her death to terminate the trust without his consent.

Counsel for the petitioner argues, however, that in determining whether the settlor relinquished control in a case like this, the "solidarity of the family is a circumstance of considerable importance". It is at least doubtful whether the phrase "solidarity of the family" has any legal meaning as applied to a situation in which the interests of different members of the family are conflicting. Family lawyers all know the uncompromising attitude which the parties often take under such circumstances. If, however, we yield to the suggestion that the Sargent family would presumably act as a unit, the petitioner gains no advantage. The property in the Sargent Trust had originally come to the decedent from her deceased husband, the father of the three children who were beneficiaries (R. 9–10). The decedent was eighty-three years of age when the trust was formed, and therefore her children were presumably in or past middle life. According to ordinary experience, children exercise more control over parents in such cases than parents do over children, unless the parents happen to hold the purse strings. The children of Mrs. Sargent, including Arthur H. Sargent, would certainly have presented a solid front against any proposition that their share in the property which came from their father should be handed over to their mother at her age, and that they should look to her for the money which they needed for their living expenses and take

the risks that attend the management of property by a person of advanced years.

It also appears affirmatively in the case at bar that the third trustee who must join in any termination of the trust was not under the control of the decedent. One reason for naming him in the beginning was that he was a disinterested person of independent judgment (R. 43). He was originally selected with the approval of the decedent's three children, and was at all times unwilling to join in terminating the trust unless requested to do so by all the children (R. 39). In one of the cases now before the Court for decision, *Commissioner* v. *City Bank Farmers' Trust Co.* 74 Fed. (2d) 242, 246, it was suggested in the Circuit Court of Appeals that it may be material to show as a matter of fact what the attitude of a disinterested trustee was with respect to the exercise of a power.

It should be noted that the decedent had no power to remove any trustee, and that vacancies in the office of trustee were to be filled by appointment by the surviving trustees and "approved by the then living children" of the decedent (R. 17). Accordingly, the decedent had no power to gain control of the trust property by changing the trustees.

In consequence of the facts which have been stated, it appears that the transfer when made by the decedent in 1919 was a complete and irrevocable transfer upon a trust which she was powerless to amend or revoke.

If, however, it should be assumed for the sake of the argument that because of the power of termination given to the trustees the decedent retained some measure of control over the trust property, such control was extinguished on November 9, 1920, when the decedent resigned as trustee, and Mary Adelaide Poor, her daughter, was appointed in her place. At that moment any right which she originally had to share in any exercise of the

power to terminate the trust ceased, long before the enactment of the statute now relied upon by the petitioner.

It is true that she was appointed a trustee one year later when Mrs. Poor resigned. This appointment was made by the remaining trustees in the manner provided for in the trust instrument which required the assent in writing of the three children (R. 17, 33). As was stated in the opinion in the District Court (R. 48), "The fact that at the time of her death she was one of the trustees does not affect the legal results. She held office by virtue of an appointment by the other trustees and not by virtue of any reservation in the trust deed."

It therefore appears that on any view of the facts in this case, the transfer made by the decedent was complete before the taxing statute was passed.

II. The power of termination contained in the Sargent Trust does not bring it within the scope of section 302 (d) of the Revenue Act of 1926.

Section 302 (d) (printed above at page 3) is a part of an estate tax law and should be construed so as to be consistent with the scope and purpose of such a law. An estate tax is laid on the transmission of property from the dead to the living and on transfers which are substitutes for testamentary dispositions of property.

> *Knowlton* v. *Moore*, 178 U. S. 41, 56–7
> *Milliken* v. *United States*, 283 U. S. 15, 23.
> *Heiner* v. *Donnan*, 285 U. S. 312, 322.

As has already been shown in the preceding portion of this brief, nothing remained in the decedent which would pass at her death, and the power given to the trustees did not leave in the decedent any effective control over the trust property. The transfer was not made in con-

templation of death and was not in any respect a substitute for a testamentary disposition. On the contrary, it was a present, absolute gift. Section 302 (d) as a part of an estate tax law should not be construed to include such a gift if such a construction can be avoided.

Another strong reason for construing Section 302 (d) as not applying to this power is found in the constitutional objections to the validity of the Section which would arise if a contrary construction were adopted. The reasons why Section 302 (d) if construed as applying to this power would be invalid as violating the Fifth Amendment to the Constitution of the United States, are presented in a later part of this brief at pages 22-29. They are based upon the unreasonableness of using the value of the trust property to measure a tax on the estate of the decedent, and also upon the fact that the section was not enacted until long after the transfer in question was complete. In order to avoid these constitutional objections, the statute should be construed as not including the power in question if such a construction is fairly possible. The rule which applies is a familiar one and is stated as follows in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

The rule has been stated and applied in a great variety of cases and is of general application.

Panama R. R. Co. v. *Johnson*, 264 U. S. 375, 390.
United States v. *Standard Brewery*, 251 U. S. 210, 220.
United States v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, which involved the construction and application of provisions substantially the same as those contained in Section 302 (c) of the Revenue Act of 1926, the rule was applied as follows:

> "Doubts of the constitutionality of the statute if construed as contended by the government, would require us to adopt the construction, reasonably possible here, which would uphold the act."

It is reasonably possible to adopt a construction of Section 302 (d) which excludes the power given to the trustees of the Sargent Trust.

The statute is expressly limited to transfers made by the decedent the enjoyment of which may be changed "through the exercise of a power, either by the decedent alone, or in conjunction with any person, to alter, amend or revoke." It may well be doubted whether the words "either by the decedent alone or in conjunction with any person" were intended to apply to such a power as that given to the Sargent trustees, even if the power were to be regarded as otherwise within the scope of the statute. In view of the obvious and permissible purpose of the statute to tax as part of a decedent's estate those transfers made by him which have been left so incomplete that he has the ability to recall them to himself or to modify the enjoyment of the beneficial interests which he has transferred, and in view of the other considerations which have already been urged in this argument, it is reasonable to construe the quoted words as not applying to a power vested jointly in three trustees of whom the decedent was one, when it affirmatively appears that the decedent had no control over the exercise of the power and that the effective source of the share in the power which the decedent had at death arose from an appoint-

ment of the decedent as a trustee made by the other trustees with the concurrence of the beneficiaries. This appears to have been the view taken by the Judge of the District Court (R. 47–48). In the case at bar, the decedent as an individual could not exercise or require the exercise of the power. Her resignation as trustee in 1920 ended any right which she had to participate in the exercise of the power. Her reappointment in 1921 was the act of the two remaining trustees which required the assent of all three children of the decedent (R. 17, 33, 45, 48). After her reappointment the situation was no different in principle from that which would have existed if she had made an outright gift of the property to her children and then a year later they had put the property in trust, made her a trustee, and given the trustees a power to terminate the trust. Only a literalist would treat Section 302 (d) as applying to such a case. It is submitted that it has no more application to the case at bar than to the supposed case.

If, however, the statute should be construed literally, the power in the Sargent Trust would not be within its scope. The statute applies to powers to "alter, amend or revoke". The power to terminate, which was contained in the Sargent Trust was not a power to alter or amend and is not a power to revoke if that word is to be construed literally. The word "revoke" has no proper application to an act which accomplishes the termination of a trust even though, in consequence of that termination the property may revest in the settlor, unless the settlor himself is to be the dominant actor in exercising the power. Any careful lawyer would describe the power in the case at bar as a power to terminate and not as a power to revoke.

For the reasons which have been stated it is submitted

that Section 302 (d) should be construed as not applying to the power contained in the Sargent Trust.

There is nothing in *Porter* v. *Commissioner*, 288 U. S. 436, which is inconsistent with this conclusion. In that case the settlor reserved to himself alone the power to alter the terms of the trust during his lifetime in any respect except that he could not make changes in favor of himself or his estate. This was clearly a power to "alter" or "amend" which could be exercised by the settlor alone and gave him the power up to the time of his death to determine who should enjoy the trust property. It was on the ground that control was in the settlor alone that the transfer was distinguished from those transfers in *Reinecke* v. *Northern Trust Co.* 278 U. S. 339, which were held non-taxable. The case is clearly distinguishable from the case at bar on the same ground.

III. The imposition of an estate tax upon the estate of the decedent measured in any degree by the value of the property of the Sargent Trust, if seemingly warranted by the language of 302 (d) of the Revenue Act of 1926, would be a taking of property without due process of law in violation of the Fifth Amendment to the Constitution.

There are two objections on constitutional grounds to the application of the provisions of Section 302 (d) to the Sargent Trust, should those provisions be construed as requiring the inclusion of the value of the trust property in Mrs. Sargent's gross estate. The first of these objections is based on the facts that Mrs. Sargent had no interest in the trust property which passed to others by reason of her death and that the conveyance in trust was not made in anticipation of death and bore no relation to her death. The second objection rests upon the fact that the provisions of 302 (d) were not enacted into

law until after Mrs. Sargent's transfer in trust had been fully completed. These two objections will be discussed in order.

(a) Congress has no power to impose an estate tax upon the estate of this decedent measured in any degree by the value of the property of the Sargent Trust, merely because she had previously transferred this property in trust and at the time of her death shared with two other trustees a power to terminate this trust.

It seems clear from *Heiner* v. *Donnan*, 285 U. S. 312, which has already been referred to, that Congress has no power to include as part of the measure of an *estate tax* the value of property previously transferred by a decedent without reservation of powers which make his transfer incomplete in substantial respects, unless the transfer has characteristics or motives behind it, as in the case of gifts in contemplation of death, which make the transfer testamentary in effect. In that case, in discussing the nature and scope of the Federal Estate Tax, the Court said, at p. 322:

> "The thing taxed is the transmission of property from the dead to the living. It does not include pure gifts *inter vivos*. The tax rests, in essence, 'upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested . . . it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' *Knowlton* v. *Moore*, 178 U. S. 41, 56, 57. The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect.

Milliken v. *United States*, 283 U. S. 15, 23. But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley* v. *McCaughn*, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death."

As further pointed out in *Heiner* v. *Donnan*, at pages 331–2, the power which Congress has to impose a gift tax upon transfers *inter vivos* does not warrant the inclusion of such gifts in a decedent's "gross estate" when they were not made in actual contemplation of death; for the value of such property, especially when taken at the date of decedent's death, constitutes no fair measure of the value for an estate tax.

In other words an estate tax cannot properly be made to include a delayed tax on completed gifts which are not testamentary in their nature.

Under the reasoning in *Heiner* v. *Donnan*, 285 U. S. 312, the fact that Mrs. Sargent at the time of her death was one of the three trustees who had a power to terminate the trust which she had created by gift eleven years before her death, is not a sufficient reason for including the value of the trust property in her gross estate for the purpose of measuring her estate tax. The property was not hers at the time of her death and no interest passed from her to others at or by reason of her death or by reason of any act of hers in anticipation of, or otherwise referable to, the event of her death. The power did not represent an interest retained by her in the trust property. It was not personal to her but was attached to the office of trustee, and was shared by two other trustees, one of whom was a principal beneficiary and the other a person of independent judgment who was unwilling to join in exercising it without consent of all of Mrs. Sargent's

children. She shared in the power only so long as she was trustee; and the power did not terminate at her death but continued in whoever should be trustees. Under these circumstances it seems impossible to find in this power any reasonable justification for using the value of the trust property as part of the measure of the tax imposed upon the passing of Mrs. Sargent's property at death.

(b) Congress has no power to tax Mrs. Sargent's transfer in trust by legislation enacted after the transfer was completed.

If it could be found that the power in the case at bar falls within the scope of Section 302 (d) and that it lies within the constitutional power of Congress to include in that section a *prospective* transfer in trust having all the features of the Sargent Trust, nevertheless that section must fail in its application to Mrs. Sargent's transfer because that transfer *was completed* before the provisions now found in 302 (d) or any similar provisions were enacted. Such provisions were first enacted as Section 302 (d) of the Revenue Act of 1924.

It is familiar law that Congress has no power to tax the exercise of a privilege by legislation enacted after the privilege has been fully exercised.

Nichols v. *Coolidge*, 274 U. S. 531.
Untermeyer v. *Anderson*, 276 U. S. 440.
Coolidge v. *Long*, 282 U. S. 582.
Blodgett v. *Holden*, 275 U. S. 142.

In *Nichols* v. *Coolidge*, 274 U. S. 531, affirming *Coolidge* v. *Nichols*, 4 Fed. (2d) 112, (Mass. Dist.) it was held that in so far as the Revenue Act of 1919 purported to impose an estate tax with respect to transfers completed prior to the enactment of the federal estate tax law, it was uncon-

situtional under the due process clause of the Fifth Amendment. In that case the value of the property transferred had been included in the value of the gross estate of the transferor for the purpose of computing the estate tax under the provisions of 402 (c) of the Act of 1919. The government claimed that it was properly so included since the transfer when made was intended to take effect in possession and enjoyment at or after the transferor's death. The conclusion of this Court is stated in the final paragraph of the opinion, as follows:

> "And we must conclude that § 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

In *Blodgett* v. *Holden*, 275 U. S. 142, it was held that the provisions of the Revenue Act of 1924, Secs. 319–324, imposing a tax upon gifts were unconstitutional in so far as they purported to tax gifts which were complete prior to the passage of the act.

In *Untermeyer* v. *Anderson*, 276 U. S. 440, a similar result was reached, when the gift took place while the bill which imposed the gift tax of 1924 was before the conference committee of the House and Senate and only three days before it finally passed both Houses.

In *Coolidge* v. *Long*, 282 U. S. 582, the question before this Court was the validity of provisions of the Massachusetts inheritance tax law as applied to a transfer which the Supreme Court of Massachusetts had held to have been intended to take effect in possession and enjoyment at or after death, within the meaning of a statute passed after the gift had been consummated.

It was held that in so far as this statute purported to tax a transfer consummated before its passage, it was in violation of the due process clause of the Fourteenth Amendment. In the course of the opinion at page 599 it was said:

> "No act of Congress has been held by this Court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment."

On the principle of the cited cases the provisions of Section 302 (d) cannot be applied to tax Mrs. Sargent's transfer, made in 1919, or to measure her estate tax by the value of the trust property unless that transfer remained incomplete up to the time of her death. It has already appeared in preceding portions of this argument that the power to terminate the trust, even if construed as a power to revoke, did not leave the transfer incomplete. (See this brief, pp. 11-18.) As was stated in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 346, with respect to a power reserved by a settlor which could be exercised in four of the trusts by the settlor and the single beneficiary of each of the trusts and in the fifth trust by the settlor and a majority of the beneficiaries:

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by the decedent which might inure to his own benefit as if the gift had been absolute."

The same result was reached in *McCormick* v. *Burnet*, 283 U. S. 784, where the settlor had the power to terminate the trust in whole or in part with the consent of one or more of her three children, who were life beneficiaries.

This Court has consistently recognized the rule laid down in *Reinecke* v. *Northern Trust Co.* that where the power to alter or revoke a trust is dependent on the consent of a beneficiary, the trust has passed completely from the control of the settlor.

See *Coolidge* v. *Long*, 282 U. S. 582, 628.
Porter v. *Commissioner*, 288 U. S. 436, 442.
Reinecke v. *Smith*, 289 U. S. 172, 176.

In *Porter* v. *Commissioner*, 288 U. S. 436, which is relied upon by the petitioner the power to alter or modify the trust indenture differed from the powers in the case at bar and in the cited cases in that the settlor *alone* had the power to alter or amend without concurrence or consent of any beneficiary. In the course of the opinion this Court, at page 442, expressly distinguished the trust then under consideration from the trusts held in *Reinecke* v. *Northern Trust Co.* to have been non-taxable, saying as to those trusts:

> "As title was put beyond his" (the settlor's) "control we held these transfers not taxable."

After stating that Section 302 (d) of the Revenue Act of 1926, cannot be limited by construction to include only such powers as enable the settlor to *repossess himself* of valuable interests in the property, the opinion in the *Porter* case went on to state at page 443, as the reason for the proper application of 302 (d) to the case then before it:

> "Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of

> others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable."

Answering the argument that the application of (d) to the case then before the Court would be confiscatory because it would measure the decedent's tax by property belonging to others and would tax gifts *inter vivos* that were fully consummated prior to the enactment of subdivision (d), the Court said at page 444:

> "But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living."

From the above quoted extracts it is clear that the constitutionality of the tax in the *Porter* case was sustained because the power in that case *left the settlor dominant* up to the time of his death with respect to the rights of those beneficially interested in the property. This feature of control, which, as the Court pointed out, distinguished that case from *Reinecke* v. *Northern Trust Co.*, also distinguishes the *Porter* case from the case at bar.

IV. There is no basis for including a part of the trust property in the gross estate.

The petitioner claims that it is possible to separate the adverse interest of Arthur H. Sargent in the trust from the interests given to the other two children, and to include the value of such remaining interests in the gross estate (Petitioner's brief, p. 9). In the present case Arthur H. Sargent had an undivided interest in the in-

come from the beginning of the trust until after the death of the decedent and a right to appoint an undivided interest (one-third) in the capital. The termination of the trust as to any portion of the trust property would therefore have diminished the value of his interest. Accordingly he had a direct personal interest adverse to any partial termination of the trust. The case at bar is entirely unlike *Lit* v. *Commissioner*, 72 F. (2d) 551, in which the decedent and one of the persons beneficially entitled under the trust had a power which they could exercise jointly to *alter* or *amend* the trust under which they could have destroyed the interests of other beneficiaries without affecting the interest of the beneficiary who was one of the donees of the power. The Sargent Trust contained no power to alter or amend.

In the *Lit* case the transfer in trust was made in 1927. The income from the trust was payable to the wife of the settlor for life and to the settlor after her death, if he survived her, and on the death of the survivor of both, the capital was to be transferred to their son or his appointees. The trust instrument provided that it might be "revoked or amended" by an instrument executed by the settlor and his wife. The decision of the Board of Tax Appeals (28 B.T.A. 853), which was adopted by the Circuit Court of Appeals, recognized the applicability and binding force of *Reinecke* v. *Northern Trust Co.*, but decided that, although the interest of the wife could not be included in the gross estate, the interest of the remainder-man might be, as the settlor and his wife could have destroyed the interest of the remainder-man without affecting the life interest of the wife (*Lit* v. *Commissioner*, 28 B.T.A., 853, 858–861).

In the case at bar as there was no power to alter or amend and the interest of Arthur H. Sargent was not separable, there is no basis for a claim that a part of the

trust property should be included in the gross estate. In pointing out that the *Lit* case is clearly distinguishable, no tacit admission is intended that that case was correctly decided.

It should be pointed out that the *Lit* case did not lay down any general proposition that if a trust may be terminated with the consent of some of the beneficiaries, the interests of the other beneficiaries may be included in the gross estate of the settlor. In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, and *McCormick* v. *Burnet*, 283 U. S. 784 (the facts of which are reported in 43 F. (2d) 277) this Court has treated conveyances in trust which were subject to change or revocation with the assent of less than all the beneficiaries as completed transfers to the extent of the whole of the property conveyed.

CONCLUSION

For the reasons which have been stated, it is submitted that the decision of the Court below was correct and should be affirmed.

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